FILED
JAN 26 2001
OFFICE OF THE CLERK

(3)

No. 00-800

IN THE

Supreme Court of the United States

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ENRON POWER MARKETING, INC. IN OPPOSITION

JEFFREY D. WATKISS
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 828-5800

LOUIS R. COHEN
Counsel of Record
JOSEPH E. KILLORY, JR.
IJAY PALANSKY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Respondent Enron Power Marketing, Inc.

3000

QUESTIONS PRESENTED

1. Whether the findings of the Federal Energy Regulatory Commission (FERC) of pervasive present undue discrimination in the transmission of electric power were supported by substantial evidence.

2. Whether FERC had authority under Section 206 of the Federal Power Act to remedy the pervasive present undue discrimination it had found by ordering each transmission-owning utility to file an open access transmission tariff (OATT).

RULE 29.6 STATEMENT

Enron Corp. is the only publicly held company that owns 10% or more of respondent's stock. The following companies are the parent companies of respondent:

Enron Corp.

Enron North America Corp.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Statutory Background 2

B. Regulatory Background 3

C. Proceedings in the D.C. Circuit 6

ARGUMENT 7

I. THE QUESTION WHETHER FERC HAD SUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF ACTUAL PRESENT UNDUE DISCRIMINATION DOES NOT WARRANT THIS COURT'S REVIEW 7

II. FERC'S AUTHORITY UNDER SECTION 206(a) TO REMEDY UNDUE DISCRIMINATION BY ORDERING OPEN ACCESS IS CLEAR AND DOES NOT MERIT THIS COURT'S REVIEW 12

CONCLUSION 18

APPENDIX A: Statutory Provision — 16 U.S.C. § 824a 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Anaheim, Riverside, Banning, Colton, & Azusa, California v. FERC, 669 F.2d 799 (D.C. Cir. 1981) 10
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 13
Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) ..... *passim*
Bloomer Shippers Association v. Interstate Commerce Commission, 679 F.2d 668 (7th Cir. 1982) 10
Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11
Ex Parte Collett, 337 U.S. 55 (1949) 14
Louisiana Public Service Commission v. FERC, 174 F.3d 218 (D.C. Cir. 1999) 10
NLRB v. Fremont Manufacturing Co., 558 F.2d 889 (8th Cir. 1977) 10
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 7, 15, 16
Transmission Access Policy Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) ..... *passim*
Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985) 11, 13

STATUTES

Federal Power Act
16 U.S.C. § 824a 16
16 U.S.C. § 824d(b) 2
16 U.S.C. § 824e(a) 2, 3, 12
16 U.S.C. § 824k(e) 17

TABLE OF AUTHORITIES — Continued

Page(s)

Natural Gas Act, 15 U.S.C. § 717d 13
Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 15
Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938) 15

ADMINISTRATIVE MATERIALS

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities, Order No. 888, [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶31,036 (1996) ..... *passim*

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-A, [Reg. Preambles] III F.E.R.C. Stats. & Regs. ¶31,048 (1997) ..... *passim*

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶32,514 (1995) 8, 9

IN THE

Supreme Court of the United States

No. 00-800

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ENRON POWER MARKETING, INC. IN OPPOSITION

Enron Power Marketing, Inc. (Enron) respectfully opposes the petition of the Board of Water, Light and Sinking Fund Commissioners of The City of Dalton, Georgia (Dalton), seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT

In Order Nos. 888 and 888-A, the Federal Energy Regulatory Commission (a) found that electric utilities that own electric transmission facilities are engaged in pervasive undue discrimination in favor of their own uses and against competing users, including competing suppliers of electricity; (b) partially remedied that undue discrimination

by ordering such utilities to file "open access transmission tariffs" (OATTs) and requiring the utilities to take transmission service for their own *wholesale* sales and *un*bundled retail sales on the same terms applicable to all other users; but (c) declined on jurisdictional grounds to apply this requirement to a utility's transmission services for which the charge is "bundled" by the utility into its retail charge for electricity. The D.C. Circuit generally upheld FERC's Orders.

The Dalton petition is one of three seeking review of the D.C. Circuit's decision. In No. 00-568, the State of New York and others contend that FERC's orders exceeded its jurisdiction. In No. 00-809, Enron seeks review on the opposite ground: that FERC understated its jurisdiction and hence failed to respond to transmission-owning utilities' discrimination in favor of their own bundled retail sales, a serious nationwide problem that FERC had found and was obligated to cure. In No. 00-800, Dalton presents questions that boil down to an extended argument that FERC did not have sufficient evidence to support its findings of undue discrimination; Enron opposes this petition because the evidentiary issues it poses do not merit this Court's review.

A. Statutory Background

Section 205(b) of the Federal Power Act (FPA), 16 U.S.C. § 824d(b),[1] bars any public utility from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage." When FERC finds such undue discrimination, Section 206(a) of the Act, 16 U.S.C. § 824e(a), commands FERC to provide a remedy. If FERC determines that a practice is "unjust, unreasonable, unduly discriminatory or preferential," FERC must cure the

---

[1] All statutory provisions cited in this brief are set out in No. 00-809 Pet. App. 645a-681a, except for 16 U.S.C. § 824a, which is set out in the appendix to this opposition.

discrimination by "determin[ing] the just and reasonable rate, charge, classification, rule, regulation, [or] practice . . . to be thereafter observed and in force, and shall fix the same by order." *Id.* In the present instance, the remedy FERC imposed was (partial) open and nondiscriminatory access to a utility's transmission facilities. No provision of the Act limits FERC's power to order open and nondiscriminatory access as a Section 206(a) remedy for undue discrimination.

B. Regulatory Background

The businesses of generating, transmitting, and selling electric energy are undergoing major structural change. Historically, electricity was provided to almost all users by vertically-integrated regulated-monopoly local utilities, which performed or contracted for all three functions (generation, transmission, and distribution) and sold delivered electricity to each user for a single bundled charge. Today, in large part because Congress adopted measures to encourage competition among energy producers, *see* No. 00-809 Pet. App. 147a-156a, electric energy is generated and marketed by a multitude of competing firms, including the traditional monopoly utilities competing in other markets.

Important segments of the transmission grid, however, continue to be owned by the monopoly local utilities. In Order Nos. 888 and 888-A, FERC concluded that these utilities have an inherent incentive to discriminate, and have been and are discriminating, against competing suppliers that are dependent on the utilities for transmission services. *See* No. 00-809 Pet. App. 214a-216a, 315a-331a. To remedy this undue discrimination (in part), FERC required each such utility to adopt a pro forma OATT and to take transmission service for its own wholesale and unbundled retail sales under the OATT pursuant to the same terms and conditions it offers to other users. No. 00-809 Pet. App. 178a.

These remedial orders were a direct response to fundamental changes in the industry, particularly the

emergence and growth of independent generators and marketers of electric power that compete with the traditional local-monopoly utilities. This new competition came about because of both legal and technological changes. In response to the energy crisis of the 1970s, Congress enacted the Public Utility Regulatory Policies Act of 1978, and later the Energy Policy Act of 1992, which encouraged competition with the established utilities by creating incentives for the construction of new generation facilities. *See* No. 00-809 Pet. App. 152a-157a. Over the same period, technical advances permitted transmission of electric power over longer distances without excessive losses. *See* No. 00-809 Pet. App. 9a-10a. These factors, together with the creation of a large interstate transmission grid, so altered the industry that "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." No. 00-809 Pet. App. 151a (alteration in original) (internal quotations and citation omitted).

New competitive generation activities, however, faced a "serious obstacle." No. 00-809 Pet. App. 10a. In many areas, the traditional local-monopoly utilities continue to own the only regional facilities available for transmission of electric energy. The nascent competition from independent energy suppliers was threatened by the anticompetitive practices of these utilities. As FERC found, these utilities have exercised their monopoly power by discriminating against competing sources of power, hindering the new generation and marketing companies from transmitting their electric power on competitive terms.

In Order No. 888, FERC made extensive findings of both existing and potential future undue discrimination by utilities against competing electric energy producers. The Order's findings of present and potential future discrimination were straightforward and unqualified. FERC prefaced Order No. 888 by stating, "[i]n this rule, the Commission seeks to remedy both existing and future undue

discrimination in the industry." No. 00-809 Pet. App. 133a. FERC went on to find "more than sufficient reason to believe that transmission monopolists currently engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so." No. 00-809 Pet. App. 216a-217a. FERC noted that this discrimination takes the form of both outright refusals to transmit the power generated by competitors and more subtle forms of discrimination, including imposing terms of transmission less favorable than those enjoyed by the transmission-owning utilities themselves. *See, e.g.*, No. 00-809 Pet. App. 213a-217a.

FERC's findings of undue discrimination included a comprehensive account of the systemic problems and anti-competitive incentives that had already caused transmission owners to discriminate unduly. *See* No. 00-809 Pet. App. 213a ("We conclude that unduly discriminatory and anticompetitive practices exist today in the electric industry and, more importantly, that such practices will increase as competitive pressures continue to grow . . . ."). Order No. 888-A explained that "[t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors . . . to favor their own generation . . . ." No. 00-809 Pet. App. 436a (internal quotations and citation omitted).

FERC's findings of undue discrimination also "rel[ied] in part on the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the [Notice of Proposed Rulemaking]." No. 00-809 Pet. App. 435a. Detailed examples of specific instances of claimed undue discrimination were described in Appendix C to Order No. 888. *See* No. 00-809 Pet. App. 315a-331a. These examples included accounts of "refusals

to wheel,[2] dilatory tactics that so protracted negotiations as to effectively deny wheeling, refusals to provide service priority equal to native load, or refusals to provide service flexibility equivalent to the utility's own use." No. 00-809 Pet. App. 316a.

FERC's partial remedy for this undue discrimination was to order "open access," requiring every public utility to transmit the electric energy of other firms, including its power-producing competitors, "under the same tariff of general applicability" as applied to the wholesale and unbundled retail transmission of the utility's own electric energy. No. 00-809 Pet. App. 178a. FERC explained its decision to order such open access saying, "The only way to effectuate competitive markets and remedy discrimination is through readily available, nondiscriminatory transmission access." No. 00-809 Pet. App. 382.

C. Proceedings in the D.C. Circuit

The D.C. Circuit upheld FERC's orders against a variety of challenges. One of these came from Dalton and others, which alleged that FERC had not made the necessary findings of undue discrimination to support its orders, and that the open access remedy exceeded FERC's statutory authority.

The D.C. Circuit held that FERC's findings of "a fundamental systemic problem in the industry," No. 00-809 Pet. App. 13a-14a, and "systemic monopoly conditions and the resulting potential for anti-competitive behavior," No. 00-809 Pet. App. 22a, were reasonable, and constituted sufficient basis for FERC's actions under Section 206, *see* No. 00-809 Pet. App. 21a-24a. The court also expressly rejected Dalton's argument that before acting under Section

---

[2] "Wheeling" is a term of art describing the practice of transmitting one producer's energy over the transmission lines of another. *See Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987).

206(a) FERC was required to find that particular utilities had engaged in specific acts of undue discrimination. No. 00-809 Pet. App. 22a-23a.

The D.C. Circuit went on to reject Dalton's arguments that FERC lacked authority to order open access as a remedy for undue discrimination. The court held that its decision was controlled by *Associated Gas Distributors v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987) (*AGD*), which upheld a parallel open access requirement that FERC had imposed on the transportation of natural gas, pursuant to language in the Natural Gas Act (NGA) materially identical to Section 206 of the FPA. No. 00-809 Pet. App. 19a-21a. The Court rejected as inapplicable the precedent chiefly relied upon by petitioners, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), because that case did not consider the scope of FERC's authority to order open access as a remedy under Section 206(a) of the FPA for undue discrimination.

ARGUMENT

Dalton seeks review of one evidentiary question and one phantom issue. Dalton's first argument amounts to a claim that FERC's findings of undue discrimination were based on insufficient evidence. Dalton's second argument ignores FERC's findings of actual present undue discrimination and rests on a decision (*Otter Tail*) that does not address FERC's power to remedy such discrimination. Neither issue warrants this Court's review.

I. THE QUESTION WHETHER FERC HAD SUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF ACTUAL PRESENT UNDUE DISCRIMINATION DOES NOT WARRANT THIS COURT'S REVIEW.

Although framed as a question of statutory construction, Dalton's first Question Presented actually asks the Court to review the evidence supporting FERC's findings of undue

discrimination. Dalton's question asks whether the finding of conditions creating a "*potential* for anticompetitive behavior" (Dalton Pet. at 14 (emphasis added)) is statutorily sufficient for FERC to impose a remedy under Section 206. But FERC did not find mere "potential" future undue discrimination. FERC found actual present undue discrimination. The findings were based in part on structural conditions in the industry, and on inferences FERC drew from these conditions, but the findings were also based on widespread accounts of specific instances of undue discrimination. These are both appropriate bases for empirical findings supporting a rulemaking, and the D.C. Circuit's affirmance of the findings presents no certworthy issue.

FERC expressly found actual, not merely potential, undue discrimination by the owners of transmission facilities. FERC stated that the very purpose of Order No. 888 was "to remedy both *existing* and future undue discrimination." No. 00-809 Pet. App. 133a (emphasis added). FERC stated that "unduly discriminatory and anticompetitive practices exist *today* in the electric industry." No. 00-809 Pet. App. 213a (emphasis added). FERC had found that "[i]n the past, transmission-owning utilities have discriminated against others seeking transmission access," No. 00-809 Pet. App. 614a, and FERC said that it expected "the same type of discriminatory and anticompetitive behavior [to] continue," if left unremedied, No. 00-809 Pet. App. 622a.

Dalton contends that in Order No. 888-A FERC jettisoned this finding: "[FERC] abandoned its claim that evidence of record supported a finding of existing undue discrimination." (Dalton Pet. at 8.) But Dalton is simply wrong: Order No. 888-A left substantially intact the factual findings FERC set out in Order No. 888. For example, Order No. 888-A emphasized that "[t]he record supports our conclusion that, absent open access, undue discrimination will *continue* to be a fact of life in *today's* and tomorrow's

electric power markets," No. 00-809 Pet. App. 382a (emphasis added), and went on to state that "the vast majority of utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales," No. 00-809 Pet. App. 436a-437a.

FERC's findings of actual present undue discrimination were based on two kinds of evidence: structural conditions in the industry and accounts of specific instances of undue discrimination. Both properly support the findings.

With respect to structural conditions, the D.C. Circuit described FERC's findings as follows:

> The Commission found that "utilities owning or controlling transmission facilities possess substantial market power, that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices."

No. 00-809 Pet. App. 11a (quoting Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats & Regs. ¶32,514, at 33,032 (1995) (No. 00-809 Pet. App. 566a)). FERC said that structural conditions in the industry "make it inevitable that [the transmission-owning utilities] will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors." No. 00-809 Pet. App. 214a, 436a (internal quotation omitted). FERC found a "fundamental systemic problem in the industry," No. 00-809 Pet. App. 13a-14a: where monopoly transmission facilities are owned by an electricity supplier in active competition with other suppliers that must use the same facilities, the owner will inevitably

tend to discriminate against its competitors to maximize its own profit. FERC found that this incentive had caused utilities to refuse to offer transmission services to their competitors on equal terms. *See* No. 00-809 Pet. App. 213a-215a, 435a-437a. These findings, although based in part on inferences from the industry's structure, were not conjecture; they were findings of actual present undue discrimination based on structural facts and elementary economics.

As the D.C. Circuit noted, *see* No. 00-809 Pet. App. 22a-23a, it has repeatedly ruled that an agency is entitled to make reasonable factual determinations based on structural inferences. *See AGD*, 824 F.2d at 1008-09 (upholding FERC inferences based on the general incentives at work in the natural gas transportation industry). In fact, the D.C. Circuit has emphasized that "inference[s] from all the circumstances are the stuff of which substantial evidence is made." *Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 227 (D.C. Cir. 1999) (alteration in original) (internal quotations and citation omitted); *see also Anaheim, Riverside, Banning, Colton, & Azusa, California v. FERC*, 669 F.2d 799, 802 (D.C. Cir. 1981) (upholding FERC findings that were "reasoned inferences from substantial evidence"); *Bloomer Shippers Ass'n v. Interstate Commerce Comm'n*, 679 F.2d 668, 672 (7th Cir. 1982) (refusing to evaluate the weight of the evidence because "the weighing of the evidence and the drawing of inferences and conclusions from it" are the functions of the agency alone) (citations omitted); *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889, 890-91 (8th Cir. 1977) ("In analyzing the evidence, whether circumstantial or direct, the Board is free to draw reasonable inferences.") (citation omitted).

FERC also relied on "the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the [Notice of Proposed Rulemaking]." No. 00-809 Pet. App. 455a. Appendix C to Order No. 888 recounts reports of undue

discrimination including refusals to wheel, dilatory tactics amounting to refusals to wheel, and refusals to offer comparable service. No. 00-809 Pet. App. 315a-331a. Dalton suggests that these accounts are not a valid foundation for FERC's findings because they do not amount to individualized determinations of undue discrimination by particular utilities.[3] (*See* Dalton Pet. at 21.) But rulemaking can be based on "comments from customers" on which it is reasonable for the agency to rely. *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1158 (D.C. Cir. 1985). FERC was not required to make case-by-case findings with respect to all, or any, individual firms. No. 00-809 Pet. App. 23a ("the agency is . . . not required to make 'specific findings,' so long as the agency's factual determinations are reasonable") (citation omitted); *see also AGD*, 824 F.2d at 1008-09 (upholding FERC's open access rule under the Natural Gas Act against claims of failure to make pipeline-specific factual findings, on the grounds that "[t]he Commission is not required to make individual findings . . . if it exercises its § 5 authority by means of a generic rule.") (citation omitted); *Wisconsin Gas*, 770 F.2d at 1165-68. As the D.C. Circuit held, FERC's reliance on credible reports of specific instances of actual undue discrimination is also a legitimate basis for FERC's factual findings. *See* No. 00-809 Pet. App. 22a-23a.

Finally, Dalton's argument that the D.C. Circuit misapplied *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), on this point is based

---

[3] Dalton contends that its unique common-ownership situation demonstrates that it has not discriminated unduly (*see* Dalton Pet. at 16-18) and alleges that FERC should have "afforded [it] a reasonable opportunity to respond" to allegations that it was responsible for undue discrimination. (Dalton Pet. at 21). But Dalton was afforded a full opportunity to respond to claims of undue discrimination throughout the rulemaking. Moreover, if Dalton believes that open access is not appropriate in its particular case, it is free to petition FERC for redress under Section 206. *See* No. 00-809 Pet. App. 24a.

on a false premise. Dalton asserts (Dalton Pet. at 7) that FERC erroneously interpreted Section 206 to allow it to base its orders on merely potential future undue discrimination. Dalton then argues that this interpretation was not entitled to deference because it is contrary to the plain meaning of the statute. But FERC made no such interpretation; and the court of appeals engaged in no such deference. FERC found actual present undue discrimination, and the court of appeals determined that FERC had an adequate basis for that finding. It accepted FERC's findings without any reliance on *Chevron*. There is no broader issue that requires this Court's review.[4]

II. FERC'S AUTHORITY UNDER SECTION 206(a) TO REMEDY UNDUE DISCRIMINATION BY ORDERING OPEN ACCESS IS CLEAR AND DOES NOT MERIT THIS COURT'S REVIEW.

Dalton's second Question Presented starts from a false premise. The issue before the D.C. Circuit was not, as Dalton suggests, whether FERC had general statutory power to require open access as being in the public interest. The issue was whether open access is a permissible remedy under Section 206(a) for the actual present discrimination that FERC found. Dalton's argument that FERC lacks general statutory power under other sections of the Act to order open access is an attack on a straw man.

Section 206(a) commands FERC, after a finding of undue discrimination, to cure such discrimination by ordering the "just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force." 16 U.S.C. § 824e(a). The language

---

[4] The D.C. Circuit does discuss *Chevron* in the section of its opinion dealing with the power of FERC to order wheeling as a remedy for undue discrimination. *See* No. 00-809 Pet. App. 20a-21a. *Chevron* is never mentioned, however, in the section that discusses the sufficiency of the evidence of undue discrimination. *See* No. 00-809 Pet. App. 21a-24a.

is broad; it contains no pertinent limitation on FERC's authority to order open access.[5]

On the contrary, FERC has clear authority, established under the parallel provision of the NGA, to order open access as a remedy under Section 206. At issue in *AGD* was FERC's Order No. 436, requiring natural gas pipelines to provide open access as a remedy for undue discrimination in the transportation of natural gas.[6] A group of pipelines petitioned the D.C. Circuit for review, arguing that because Congress had not adopted proposals to convert the gas pipelines into common carriers, and had not otherwise granted FERC the affirmative authority to order open access, FERC could not order open access as a remedy for undue discrimination under Section 5 of the NGA, 15 U.S.C. § 717d. The D.C. Circuit rejected this argument and upheld FERC's order requiring open access. The court's decision was based on the breadth of Section 5's affirmative directive to "stamp out" undue discrimination, *AGD*, 824 F.2d at 998, and the fact that there was "no language in the NGA barring the Commission from imposing common carrier status on natural gas pipelines," *id.* at 997. The court said the

---

[5] FERC's industry-wide OATT is a well-tailored start toward meeting FERC's obligations under Section 206 in light of the systemic and "inevitable," No. 00-809 Pet. App. 436a (quoting No. 00-809 Pet. App. 214a), undue discrimination FERC found. Dalton suggests (*see* Dalton Pet. at 21) that FERC was required to make findings of undue discrimination by each utility subject to FERC's orders. But as Dalton also acknowledges (*see id.*), FERC had the authority to proceed by rulemaking to solve an actual and specific, but pervasive, problem. *See* No. 00-809 Pet. App. 22a-23a; *AGD*, 824 F.2d at 1008-09; *Wisconsin Gas*, 770 F.2d at 1158.

[6] All provisions of Part II of the FPA pertinent to this case are "in all material respects substantially identical" to parallel provisions of the NGA. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (internal quotations omitted). This Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.*

pipelines' argument "turn[ed] statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one." *Id.* at 998.

Dalton argues that *AGD* does not control this FPA case because, although the pertinent statutory provisions are the same in all material respects, the legislative histories of the NGA and FPA differ with respect to the open access issue. Specifically, the legislative history of the FPA suggests that Congress considered and rejected a provision that would have empowered FERC's predecessor to "order wheeling if it found such action to be 'necessary or desirable in the public interest,'" *id.* (citation omitted), while the legislative history of the NGA "consists exclusively of various occasions on which Congress did not adopt proposals actually making the natural gas pipelines into common carriers," *id.* at 998-99.

But the best indication of congressional intent is, as always, the words of the statute; when Congress deliberately uses the same words in two different statutes, the compelling inference is that it meant the same thing in both.[7] Dalton argues that the *AGD* court, interpreting the NGA, rejected reliance on the FPA's legislative history because the histories of the two statutes differ as described. But the fact that that court found it easy, in construing the NGA, to reject any reliance on the legislative history of the FPA, a different statute, hardly suggests that the parallel language of the two statutes should be read differently now. The *AGD* court's ruling did not turn on the legislative history of either statute, but on the fact that Section 5 of the NGA provided FERC with the power to order open access to remedy undue

---

[7] *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("no need to refer to the legislative history where the statutory language is clear"); *see also AGD*, 824 F.2d at 997 ("courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point.") (internal quotations and citations omitted).

discrimination. *See AGD*, 824 F.2d at 998-1000. The FPA's parallel language compels the same result here.

The difference in legislative histories on this point is in any event not significant. As FERC noted in Order No. 888, the most natural explanation of the shorter legislative history on this point in the NGA context is sequence: "Congress had just debated the common carrier issue in enacting electric power regulation [and therefore] it is not surprising that Congress did not engage in debating the very same issue in enacting natural gas regulation" a mere three years later. No. 00-809 Pet. App. 204a.[8] In short, Dalton's resort to legislative history to argue that two parallel statutory provisions—Section 206 of the FPA and Section 5 of the NGA—should be interpreted differently fails when those histories are viewed in context. In any event, the legislative history cited does not support any limitation on FERC's ability to order open access as a remedy for undue discrimination.

Dalton also invokes *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), in which this Court affirmed the order of a district court requiring wheeling of electric power as a remedy for a violation of the federal antitrust laws. In the course of deciding that case, the Court considered whether the antitrust laws, insofar as they had applied to the electric power industry, had been "[r]epeal[ed] . . . by implication" by the FPA. *Id.* at 372 (internal quotations and citation omitted). The Court held that there was no repeal by implication because the FPA nowhere specifically empowered FERC to order wheeling as a general regulatory measure. The Court's conclusion rested on its analysis of Section 202(b) of the FPA, which empowers FERC to order utilities to connect their transmission facilities to the facilities

---

[8] Section 206 was enacted as part of the Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803. The Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938), was enacted less than three years later.

of others involved in the generation or sale of electricity when such connection is "necessary or appropriate in the public interest." 16 U.S.C. § 824a. The Court's conclusion was that this section does not empower the Commission to order wheeling merely because the Commission finds it "in the public interest."

Dalton argues that because, under the analysis in *Otter Tail*, FERC lacks authority under Section 202(b) to order wheeling when "necessary or appropriate in the public interest," FERC must also lack authority to open access under Section 206 upon a finding of undue discrimination. The D.C. Circuit correctly rejected this *non sequitur* on the straightforward ground that *Otter Tail* has no bearing on the present case. This case does not ask whether FERC has general power to order wheeling whenever it believes desirable. Conversely, *Otter Tail* did not address the scope of FERC's powers to remedy undue discrimination and nowhere even mentioned Section 206.[9] Contrary to Dalton's implication, *Otter Tail* does not confine the measures available to FERC to correct undue discrimination to those made available to FERC elsewhere in the FPA. That implication is negated not only by the scope of *Otter Tail*'s holding, but also by the broad language of Section 206 itself.

Dalton's petition adds another argument based on *Otter Tail* that was not discussed by the court below: *Otter Tail*'s comment that the FPA aimed to preserve "the voluntary action of the utilities" precludes FERC from ordering involuntary open access. (*See* Dalton Pet. at 11 (quoting *Otter Tail*, 410 U.S. at 374).) The "voluntary action" discussed in *Otter Tail*, however, is clearly something

---

[9] FERC noted in Order No. 888, "It would be far reaching indeed to conclude that *Otter Tail*, which was a civil antitrust suit that raised issues entirely unrelated to [FERC's] authority under section 206, is an impediment to [FERC] achieving one of the primary goals of the FPA—eradicating undue discrimination in transmission . . . ." No. 00-809 Pet. App. 185a.

different from the transmission-owning utilities' undue discrimination against their competitors, discrimination that Section 206 commands FERC to remedy.

Finally, Dalton argues (*see* Dalton Pet. at 26) that the revision of Section 211 of the FPA in 1992 to grant FERC authority to order wheeling on a case-by-case basis upon application by an electric utility implies that Congress did not intend to permit FERC to order open access as a Section 206 remedy for undue discrimination. This argument by negative implication must also fail. No provision of the FPA, including Section 211, limits FERC's ability to order open access as a remedy under Section 206. Because Section 211 was adopted after FERC Order No. 436 and the well-publicized decision in *AGD*, the natural inference is that Congress understood that FERC had broad power under both statutes to remedy undue discrimination by ordering open access—and did not wish to alter or limit that power. Indeed, Section 212(e) of the FPA, also added in 1992, is a savings provision stating, "Except as provided in section [210, 211, 212, or 214] of this title, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law." 16 U.S.C. § 824k(e). Section 211 contains no such limitation on or impairment of FERC's Section 206 remedial powers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFFREY D. WATKISS
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 828-5800

LOUIS R. COHEN
Counsel of Record
JOSEPH E. KILLORY, JR.
IJAY PALANSKY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Respondent Enron Power Marketing, Inc.

January 26, 2000